

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re K.B., a Person Coming Under the
Juvenile Court Law.

H027605

(Santa Clara County
Super. Ct. No. JD10254)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

JOSEPH B., et al.,

Defendant and Appellant.

This dependency began in 1998 with the removal of then seven-year-old K.B. and her three siblings from her mother's care. K. began living with foster parents in August 1998, and they became her court-appointed legal guardians in January 2003.¹ The guardians moved with K. to New York in June 2003. In February 2004, the foster mother passed away unexpectedly. In this post-permanency plan proceeding in

¹ For ease of reference, and to avoid confusion with her biological mother and father, we will sometimes refer to K.'s guardians as her foster mother and father.

June 2004, the juvenile court made a visitation order that left in force a visitation order entered following a hearing held in June 2003 just prior to the family's relocation to New York. The June 2003 order provided for "reasonable" visitation with K. for the mother and father, consistent with K.'s well being.

The mother and father both appealed from the June 2003 visitation order, and this court affirmed the order prior to the filing of opening briefs in this appeal. (*In re K.B.* (Aug. 2, 2004, H026294) [nonpub. opn.].) In addition, mother and father both appealed from a December 2003 visitation order that continued the June 2003 visitation order, and this court recently affirmed that order. (*In re K.B.* (Nov. 17, 2004, H027053) [nonpub. opn.].) In this appeal, mother and father continue to argue that the juvenile court abused its discretion in continuing the visitation order. We disagree, and therefore affirm.

BACKGROUND²

Seven-year-old K. and her three siblings were taken into protective custody in August 1998 because of unsanitary conditions in the home that posed a risk to the children. K. and her six-year-old sister were placed together in a foster home. The juvenile court sustained jurisdiction as to all four children in September 1998. The youngest of the four children was adopted out in 1999. K.'s sister and her other brother were returned home several years later with a plan of family maintenance. K. has been in the same placement since August 1998. Reunification services were terminated in November 1999, and a plan of long-term foster care was ordered. Since the first year of the dependency, K. has consistently refused to participate in visitation with her mother, but did visit once with her father.

² As this court has already reviewed this matter twice within the past six months, we will set out only a brief prior history. A more complete history is set out in the most recent prior appeal. (*In re K. B.*, *supra*, H027053, at pp. 2-11.)

At a post-planning review hearing in February 2002, the Department indicated that it was recommending a change from long-term foster care to legal guardianship for K. The juvenile court set a new Welfare and Institutions Code section 366.26³ hearing for June 2002. The hearing was continued several times and was eventually held in January 2003. Mother's appointed counsel told the court that the parties had worked out an arrangement to settle the case. Under the settlement plan, the guardianship would be implemented and the court would then approve a clinical assessment of visitation between K. and the mother and father. The court would review visitation in 60 days. It was hoped that a visitation order could result from the clinical assessment that would be beneficial to all parties. The court took trial waivers from the mother and father and made the orders for guardianship. The mother appealed and this court affirmed the orders for guardianship. (*In re K.B.* (Oct. 21, 2003, H025623) [nonpub. opn.])

A hearing was held in May 2003 in order to review the issue of visitation. The court heard testimony from the social worker, K.'s therapist, the mother and father, an uncle, the foster mother, and K.'s younger sister. After submission of all of the evidence, the court informed the parties that it could not find by a preponderance of the evidence that it would be detrimental to the physical or emotional well being of K. to order visitation. The court observed that a 12-year-old child should not be the one determining whether visitation should occur. The court set a date in June 2003 for the parties to return to court with a plan of visitation that would be reasonable and consistent with K.'s well being.

At the June 2003 hearing, the mother submitted a proposed visitation plan calling for weekly visitation in a therapeutic setting. K.'s guardians were about to move to New York with K., and the mother and father objected strenuously to the proposed move.

³ All further statutory references are to the Welfare and Institutions Code.

They requested that, if the court approved the move, it authorize a face-to-face therapeutic session between K. and the mother and father prior to the family leaving town. The court granted the Department's application to allow K. to move with her guardians to New York, and continued the issue of visitation for a hearing in three days.

At the scheduled hearing, the social worker reported that K. had agreed to a visit with her mother and father at her therapist's office. The parties discussed the logistics of a therapeutic visit prior to the guardians and K. leaving town the following week. The court believed that there should be some visitation in the future so that the biological family could stay connected in some way, and that the parents should have some means of contacting K.'s therapist and the supervising social worker in New York. The court made the following written order regarding visitation: "Visitation by the mother [] and the father [] shall occur as follows: the mother and father are entitled to reasonable face to face contact consistent with the well-being of the minor. The visits are to be supervised in a therapeutic setting for a minimum of one hour when the child is in California or the mother or father is in New York. [¶] The supervising social worker shall have the discretion to increase the frequency and duration of visits and to permit unsupervised visits, in consultation with the minor's therapist. [¶] The minor may initiate telephone contact with the mother and father. The mother and father are authorized to submit letters to the minor through the social worker. [¶] Visitation by the minor's siblings [] shall be at the request of any of the children."

Two days after the hearing, K. and her mother and father met for a therapy session with K.'s therapist prior to K.'s departure to New York with her guardians. The therapist reported that the visit went very well for K. The court's written orders from the hearing were filed one day later, and the mother and father appealed from the visitation order. Principally, the parents claimed that the visitation order was impermissibly vague as to the frequency and location of the visits and that these determinations may not be left up to the guardians. This court found that section 366.26, subdivision (c)(4), as amended

effective January 1, 2004, and the opinion of our Supreme Court in *In re S.B.* (2004) 32 Cal.4th 1287, disposed of the parents' arguments, and affirmed the visitation order. (*In re K.B.*, *supra*, H026294, at pp. 8-11.)

A review hearing was held in December 2003, at which the social worker recommended that guardianship continue and that the previous visitation order remain in effect, with the exception that visitation by K.'s siblings be at the request of K. rather than any of the children. K. had had phone contact and one overnight visit with her younger sister, but since moving to New York K. has not seen or talked to either her parents or her siblings and informed the social worker that she does not want to have contact with them. The mother informed the social worker in November 2003 that she has sent letters for K. every few weeks to the social worker and the supervising social worker. Neither social worker had received the letters, so the social worker suggested that the mother drop off future letters in person. The mother dropped off a letter on December 2, 2003, which the social worker mailed to K. the next day.

Both the mother and father expressed concerns that K. was not yet in therapy after having been in New York for five months, and that she was using her guardians' name even though the court had denied a request to allow her to change her name. Counsel for father requested that the court fashion an order expressing that one of the expected issues for K.'s therapy sessions was family visitation and the circumstances under which it might occur. The court expressed concern that the communication it thought was going to occur had not occurred, that nine letters from K.'s parents have not gotten to New York, and that six months had gone by without K. being in therapy. The court stated that it was not for K. to dictate whether or not she visits with her parents and that it was not happy with the delay that had occurred regarding K. being in therapy. However, the court adopted the findings and recommendations of the social worker, finding that they were still appropriate.

Both mother and father appealed from the findings and orders of the court at the December 2003 hearing, separately arguing that section 366.26, subdivision (c)(4), should be construed to require an order for visits when establishing a guardianship. They further argued that the visitation order violates the prohibition against delegation of authority. This court disagreed with these contentions for the reasons stated in our opinion affirming the June 2003 visitation order. Mother and father also argued that the juvenile court abused its discretion in continuing the June 2003 visitation order unchanged, as the order had already been proven ineffective. This court found that because the June 2003 visitation order allowed mother and father reasonable, supervised, face-to-face visitation with K. in New York consistent with K.'s well-being, the order did not make visitation contingent on K. being in therapy, and neither mother nor father requested that the court expressly order the Department or the guardians to make specific arrangements for visits, the juvenile court did not abuse its discretion in December 2003 by continuing the June 2003 visitation order. Therefore, we affirmed the December 2003 visitation order. (*In re K.B.*, *supra*, H027053, at pp.11-14.)

An interim review hearing was set for March 30, 2004. In the report prepared for the hearing, the social worker reported that the foster mother passed away unexpectedly in February 2004, but that both K. and the foster father expressed a desire to have K. remain a part of his family. K. had received the letters and Christmas gifts the mother had provided the social worker to send to K. However, K. has expressed to both this social worker and the New York social worker that she does not want to have contact with her biological family. Although the social worker offered to set up a visit by the mother with K. in New York, at the mother's request, K. told the social worker that if the mother came to New York she would not see her. The social worker informed mother by mail of K.'s response, while continuing her offer to set up a visit to take place in K.'s therapist's office. The social worker refused to forward a letter she received on March 22, 2004, from mother, finding the letter inappropriately talked about the failed

attempt for a visit in February, people ignoring court orders, and the failure of K.'s therapist to contact the mother, and that it also attached an inappropriate story.

K. began therapy on January 8, 2004. This first session included the entire family, and at the three subsequent sessions K. was accompanied by her foster father at her request. The therapist reported that much of the last two sessions were spent grieving and reminiscing about the foster mother. The therapist also reported that he is open to seeing K. without the foster father and that he could see K. weekly if need be to address concerns regarding visitation with her mother, but that if K. knew that the objective of the therapy was to reunite her with her biological family she would likely be far less trusting.

The March 30, 2004 hearing was continued to April 19, 2004, at the request of the father's counsel. On April 4, 2004, the mother filed a response to the social worker's report, objecting to many of the social worker's statements. She complained of the possible change of therapists for K., and the failure of the social worker to just send letters after blocking out inappropriate parts.

On April 19, 2004, the hearing was continued to June 1, 2004. The social worker's status review report prepared for the hearing stated that K. had met with her therapist alone three times, and has discussed issues regarding visitation, but the therapist reported that K. remains steadfast in her wish not to have contact with her biological family. The therapist also reported that he was not opposed to having contact with and receiving correspondence from K.'s family for K. The social worker recommended that the guardianship continue, that K. continue to receive counseling, and that the prior visitation order remain in effect.

Mother filed a response to the social worker's status review report, again objecting to many of the social worker's statements. She expressed the opinion that the foster father was inappropriate as the sole guardian for K.

At the June 1, 2004 hearing, the father requested that the court order that K. was to remain with her current therapist for at least one year. The court stated that it would find

the money for K. to continue with the therapist for 12 more sessions, and mother indicated that K. may still have available victim-witness funding. The court agreed to the parents' request to be able to send letters for K. directly to her therapist. The social worker stated that she was prepared to set up visitation between the parents and K., at the father's request, should K. come to California for a visit that summer. The court informed mother that it was not in a position to change K.'s placement as there was no motion to do so before it. The court requested that the social worker get copies of all of K.'s reports for the parents, and the social worker agreed to do so.

In adopting the social worker's recommendations the court stated: "The recommendations noting the objections of the parents are adopted with the court indicated funding sources that I will provide and an investigation that [mother] has indicated should be followed through. If there is victim witness funding, let's grab them. I want to keep the same therapist. I want you to send a note off that money is on the way, make that therapist set some time aside for K[.] . . . We'll review this matter on November 23rd. The parents can send a letter directly to the therapist" Another review hearing was set for November 23, 2004.

The mother and father have appealed from the findings and orders of the court at the June 1, 2004 hearing.

DISCUSSION

Father argues that it was an abuse of discretion for the juvenile court to continue the June 2003 visitation order unchanged in light of K.'s long history of resistance to visitation. Mother argues that the court abused its discretion in continuing the visitation order as it had evidence that the same order had been in place for nearly a year without compliance, and no finding was made that visits were no longer in K.'s best interests. She argues that because the court previously found that visits were in K.'s best interests, it was not only required to order visitation but to take affirmative steps to ensure that the order was complied with.

As stated in the social worker's status review report for the June 1, 2004 hearing, the visitation order at issue states: "the mother and father are entitled to reasonable face to face contact consistent with the well-being of the minor. The visits are to be supervised in a therapeutic setting for a minimum of one hour when the child is in California or the mother or father is in New York. [¶] The supervising social worker shall have the discretion to increase the frequency and duration of visits and to permit unsupervised visits, in consultation with the minor's therapist. [¶] The minor may initiate telephone contact with the mother and the father. The mother and father are authorized to submit letters to the minor through the social worker. [¶] Visitation by the minor's siblings . . . shall be at the request of K[.]"

At the time the June 2003 visitation order was made, section 366.26, subdivision (c)(4) provided as follows: "If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, . . . the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care *The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.*" (Former § 366.26, subd. (c)(4), italics added.)

The Legislature amended section 366.26, subdivision (c)(4), effective January 1, 2004, prior to the date the visitation order at issue in this appeal was entered. The amendment divided subdivision (c)(4) into paragraph (A), relating to guardianships, and paragraph (B) relating to long-term foster care. The italicized language from former section 366.26, subdivision (c)(4), now appears only in paragraph (B). Paragraph (A) contains no language regarding visitation. As our Supreme Court explained in *In re S.B.*, the amendment "makes it clear that the juvenile court's obligation to 'make an order for visitation' is triggered *only* when the court decides to leave the child with a caretaker who is not willing to become the child's legal guardian, and *not* when, as here, the court

appoints the child's caretaker as the child's legal guardian." (*In re S.B.*, *supra*, 32 Cal.4th at pp. 1295-1296.)

However, there is nothing in the amended statute that would prohibit the court from making the order that it made in this case, providing for "reasonable" visitation. The California Rules of Court provide that a juvenile court "may issue orders regarding visitation to the child by a parent" upon appointment of a guardian. (Cal. Rules of Court, rule 1465(d)(2).) The matter of visitation is therefore entirely within the court's discretion. Accordingly, we will affirm in the absence of a showing that the court " "exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." ' [Citation.]" (*In re Mark V.* (1986) 177 Cal.App.3d 754, 759, quoting *Geoffrey G.* (1979) 98 Cal.App.3d 412, 421; see also, *In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757 [the court may impose conditions or requirements to define the right to visitation in light of the particular circumstances of the case before it].)

The record shows that the juvenile court's order, which continues the June 2003 visitation order, reflected the court's considered exercise of its discretion after reviewing the social worker's reports and hearing the parents' objections to the recommended orders. Father argues that changes should have been made due to K.'s long history of resistance to visitation, but the only change he proposed was that the parents be allowed to send letters for K. directly to K.'s therapist, and the court granted that request. Mother argues that the court was required to take affirmative steps to make sure that the order was complied with, but does not suggest how this should have been done. The only request made by either parent for specific arrangements for visitation was that the Department set up a visit if K. came to California that summer. The Department stated that it was prepared to make those arrangements, and there was nothing in the record before the court indicating that the Department would not follow through. Although a visit by mother with K. in New York in February 2004 was never arranged, the social worker informed mother and the court that she remained willing to arrange such a visit to

take place at K.'s therapist's office. K.'s therapist reported that he remains hopeful that K. will soon accept telephone calls as well as correspondence from the mother and father, and would gently encourage her to consider it as the opportunity presents itself. We cannot say on this record that the juvenile court abused its discretion in June 2004 by continuing the June 2003 visitation order.⁴ As the juvenile court retains jurisdiction over the child and post-permanency planning review hearings are held every six months (§ 366.3, subd. (a)), the parents continue to have an opportunity to request a different visitation order if the visits discussed at the June 2004 hearing did not occur.

DISPOSITION

Father's request for judicial notice is granted. Father's motion for leave to file a supplemental opening brief is denied. The findings and orders of the June 1, 2004 hearing are affirmed.

⁴ Father has filed a motion for leave to file a supplemental brief, along with a request for judicial notice, relating to the amendment to § 366.26, effective January 2005. (Stats. 2004, ch. 810, § 5.) The amendment added § 366.26, subd. (c)(4)(C), by creating a new paragraph using the language in the last sentence of former § 366.26, subd. (c)(4)(B). (Stats. 2003, ch. 813, § 7.) The amendment makes it clear that when the juvenile court orders a long term plan of either guardianship or long term foster care, the court shall make an order for visitation with the parents unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child. In this case, the juvenile court entered its order for legal guardianship in January 2003, and made an order for visitation in June 2003. This appeal challenges the June 2004 visitation order which continues the June 2003 visitation order. Accordingly, we will grant the request for judicial notice but deny the request for supplemental briefing.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MCADAMS, J.